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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

COUNTY OF SANTA CLARA, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, *et al.*,

Defendants.

Case No. 5:21-cv-01655-BLF

**JOINT STATUS REPORT AND STIPULATED
REQUEST FOR ORDER CONTINUING STAY**

Pursuant to the Court’s Order of February 1, 2022, *see* ECF No. 41, the parties respectfully submit the following joint status report addressing further proceedings, together with a stipulated request for an order continuing the stay of this action through June 7, 2022.

1. This is an Administrative Procedure Act (“APA”) case in which Plaintiffs challenge a final rule promulgated by the U.S. Department of Health and Human Services (“HHS”) entitled *Securing Updated and Necessary Statutory Evaluations Timely*, 86 Fed. Reg. 5694 (Jan. 19, 2021) (the “SUNSET

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1 Rule”). The SUNSET Rule provides, in essential part, that nearly all regulations issued by HHS in Titles
2 21, 42, and 45 of the Code of Federal Regulations shall expire at the end of (1) five calendar years after
3 the year that the SUNSET Rule first becomes effective, (2) ten calendar years after the year of the
4 regulation’s promulgation, or (3) ten calendar years after the last year in which HHS assessed and, if
5 required, reviewed the regulation, whichever is latest.

6 2. Plaintiffs filed their complaint challenging the SUNSET Rule on March 9, 2021. *See* ECF
7 No. 1. Plaintiffs alleged that the SUNSET Rule is *ultra vires*, *see id.* ¶¶ 123-30; arbitrary and capricious,
8 *see id.* ¶¶ 131-33; in violation of the APA’s notice-and-comment requirements, *see id.* ¶¶ 134-39; and in
9 violation of HHS’s Tribal Consultation Policy, *see id.* ¶¶ 140-44. Plaintiffs further alleged that the
10 SUNSET Rule threatens imminent and irreparable harm to them and the general public, including by
11 creating regulatory confusion and uncertainty that will impede their ongoing operations, budgeting, and
12 planning activities. *See, e.g., id.* ¶¶ 100-02; *see generally id.* ¶¶ 95-122.

13 3. As promulgated, the SUNSET Rule was scheduled to become effective on March 22, 2021.
14 *See* 86 Fed. Reg. at 5694. Shortly before the SUNSET Rule became effective, HHS postponed its effective
15 date for one year, to March 22, 2022, pursuant to 5 U.S.C. § 705. *See* 86 Fed. Reg. 15,404 (2021). While
16 HHS did not concede liability, HHS stated that it “believes that the Court could find merit in some of
17 Plaintiffs’ claims.” *Id.* at 15,405. In particular, HHS stated that, in contrast to its prior findings, it “now
18 believes it is likely some regulations would expire without any additional process” and that this outcome
19 raises legal questions about whether “regulations promulgated through notice and comment rulemaking
20 can be terminated through an umbrella rule without individual consideration of the expiring regulations,
21 including any reliance interests.” *Id.* at 15,406. HHS further stated that it “may have significantly
22 underestimated the burden” of the rule and that the rule’s magnitude and timing “may have impeded the
23 full and deliberate consideration of all the potential issues related to the SUNSET rule.” *Id.*

24 4. On October 28, 2021, HHS issued a Notice of Proposed Rulemaking proposing to withdraw
25 or repeal the SUNSET Rule. *See* Dep’t of Health & Human Servs., Securing Updated and Necessary
26 Statutory Evaluations Timely; Proposal to Withdraw or Repeal, 86 Fed. Reg. 59,906 (Oct. 29, 2021).
27 HHS stated that it “reexamined the SUNSET final rule in light of the allegations in” this case, among other
28

things. *Id.* at 59,908. The comment period closed on December 28, 2021, and HHS received approximately 80 comments. If the withdrawal rule were to issue as proposed, Plaintiffs' claims in this case may become moot.

5. Last week, HHS postponed the effective date of the SUNSET Rule for an additional six months, to September 22, 2022. *See* 87 Fed. Reg. 12,399. HHS does not concede liability, but it explained that the interests of justice warranted a further stay of the effective date through September 22 because "(1) A postponement will permit HHS to continue and complete its review of the SUNSET final rule in light of the claims raised in the litigation; (2) the resolution of the rulemaking will inform the government's position in this lawsuit; and (3) based on HHS's review of the Complaint, HHS believes that the Court may find that: (a) Some of Plaintiffs' claims have merit; (b) Plaintiffs' allegations of harm are credible; and (c) the balance of equities and the public interest warrant postponement of the effective date to preserve the status quo while the Court considers the challenge to the SUNSET final rule." *Id.* at 12,399. HHS's present expectation is that it will complete any rulemaking prior to the new effective date, and that further postponements will not issue.

6. The parties therefore jointly request that the Court continue the stay of this action through June 7, 2022, and direct the parties to file a joint status report proposing a schedule for further proceedings by that date.

Date: March 7, 2022

Respectfully submitted,

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LOCAL RULE 5-1(i) ATTESTATION

I attest that I have obtained Jeffrey Dubner's concurrence in the filing of this document.

/s/ Steven A. Myers

Steven A. Myers

[PROPOSED] ORDER

PURSUANT TO STIPULATION, IT IS SO ORDERED. The case shall remain STAYED through June 7, 2022, by which date the parties shall submit a joint status report proposing a schedule for further proceedings.

Dated: _____

HON. BETH LABSON FREEMAN
UNITED STATES DISTRICT JUDGE